

# Indiana Board of Special Education Appeals

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## BEFORE THE INDIANA BOARD OF SPECIAL EDUCATION APPEALS

*In the Matter of K.T. and the Switzerland* )  
*County Schools and Madison Area* ) **Article 7 Hearing No. 1181-00**  
*Special Services Unit* )

The mother's request for hearing was received by the Division of Special Education, Indiana Department of Education, on September 11, 2000 and an Independent Hearing Officer (IHO) was appointed. That IHO recused herself, and on October 3, 2000, a new IHO was appointed. A series of telephonic prehearing conferences were conducted on October 13, 20 and 27, 2000. Both parties were represented by counsel. The parties discussed the issues, agreed to convene a case conference, and agreed to waive the 45-day decision deadline. On October 20, 2000, the IHO ordered the School to provide occupational therapy services and speech revisions to the Student in her home on the same basis as contemplated by the Student's May 24, 2000, individualized education program (IEP). The parties held a case conference committee meeting on November 7, 2000, and resolved most of the issues. A prehearing order was issued on November 13, 2000, setting forth the matters discussed in the prehearing conferences. The hearing was scheduled for November 16 and 17, 2000. The issue for hearing was identified as: Whether the School's proposed location for the provision of the Student's program as set forth in the Student's IEP was appropriate.

The hearing was open to the public at the request of the mother. Witnesses were separated. The parties stipulated to the admissibility of all exhibits. The School's exhibits 1 through 7 (consisting of 519 pages) and the mother's exhibit "A" were admitted. After the hearing, the parties agreed to an extension of time until December 15, 2000, for the IHO to render his decision. The IHO issued his written decision on December 15, 2000. From the testimony and evidence presented at the hearing, the IHO determined forty-five (45) Findings of Fact from which he made Conclusions of Law and issued his Orders.

### *The IHO's Findings of Fact*

The Student is thirteen (13) years old and is eligible for special education and related services as a student with multiple handicaps. During the 1999-2000 school year, the Student attended a junior high school outside of her home school. The Student is currently home-schooled by her mother. The IEP proposed for the Student for the 2000-2001 school year (dated November 7, 2000) calls for the Student to continue to receive her special education programming at the junior high school outside of

her home school.

The Student has multiple disabilities that include cerebral palsy, epilepsy, respiratory problems, gastric reflux problems, seizure disorder and motor dysfunction. The Student is nonambulatory, is not toilet trained, and is fed with a G-tube. She is often congested and sometimes must be suctioned. She is susceptible to both infectious disease and other problems related to her cerebral palsy and epilepsy. The Student has complex, chronic medical care needs. The Student has severe communication limitations. The Student is nonverbal. The Student has severely limited upper extremity movement and the use of a switch which she presses with her leg seems to be the most effective in getting the Student to respond. The Student understands simple conversations as evidenced from facial expressions and head movements. She has a communication device, an Alpha Talker, which she is currently learning to use.

The Student was evaluated by the School psychologist to assess her general intellectual level on October 13, 17, 19 and 31, 2000. Test scores and observational data indicated that the Student is functioning in a range from high moderate to the lower end of the mildly handicapped range. This roughly translates into age level scores of seven to eight years. The Student's special education teacher for the 1999-2000 school year testified that she believes the Student is functioning at a lower level on daily skills than the October, 2000, evaluation results indicated.

An IEP was developed for the Student at a case conference committee meeting held on November 7, 2000. The Student's mother agreed with the services and special education programming set forth in the IEP, but vigorously disagreed with the proposed location for the implementation of the special education programming. The proposed location for implementing the Student's IEP was the multiple handicapped (MH) classroom at a junior high school (the junior high school) which is not the Student's home school. The IEP also provided that the Student would participate in three general education classes, including English, science and an activity period.

The Student's home school is part of a four county special education cooperative. The cooperative does not provide a MH program (classroom) at the Student's home school. The cooperative implements special education programming in 2 MH classrooms in its four county area. The MH classroom closest to the Student's residence is located approximately 24 miles from the Student's home if taking the northern route, or 34 miles from the Student's residence if taking the southern route. Driving time on the northern route is between 37 and 45 minutes while the time to drive the southern route is between 48 and 60 minutes. The School has offered to transport the Student directly to the MH program traveling either route. As a result, the Student's transit time would be approximately 37 to 45 minutes (one way), but no longer than one hour.

During the 1999-2000 school year the Student was transported to the junior high school along with three other children. The transit time was approximately one hour and 35 to 45 minutes. The mother is concerned about the length of the transit time due to health concerns and fatigue of the Student. The Student's doctor also expressed concern about "the prolonged transportation from home to school." The Student's transit time to her home school is approximately 25 to 30 minutes. The Student's bus driver and the aide have received information and training regarding the Student's medical needs. The Student's bus would be equipped with a suctioning machine during transit to and from school.

The Student's teachers have not observed the Student in a fatigued condition after she has arrived at school, even after a one hour and 35 to 45 minute ride. The Student's teachers, bus driver and aide have not observed the Student have a seizure or require suctioning. The closest hospital to the Student's residence and home school is located near the junior high school.

The Student's proposed MH classroom is currently comprised of 6 students and 4 staff members, including a special education teacher with 23 years experience in special education, 2 full-time aides, and a full-time nurse (LPN). The nurse's primary responsibility involves tube feeding, monitoring and caring for the medical and health needs of the children. The nurse also administers medications and assists with diaper changes and suctioning. The classroom has a separate bathroom, a separate room for diaper changing, a kitchen area, large mats, a mat table, a supine table, a television, and will soon be equipped with a new computer.

Evaluation data from 1997 and 1998 compared with evaluation data collected in October, 2000, indicate the Student made cognitive and academic gains. Prior to being home schooled during the fall of 2000, the Student was enrolled in the cooperative's MH program at an elementary school near the junior high school, and at the junior high school. The MH program at the junior high school maximizes the availability of staff, particularly with regard to physical therapy and speech therapy. The Student's teachers have observed that she responds well to competition from her peers with similar physical disabilities in the MH program. The MH program provides for adaptive physical education. The Student is familiar with the staff and students at the junior high school, and experiences problems with transitions to new environments and people. She has a deformed esophagus and cannot tolerate the aroma of cooking food because it causes her saliva to increase, resulting in swallowing and choking problems.

The Student's home school does not have a MH classroom, nor do any MH students with similar physical and medical needs attend the school. If the Student's IEP were implemented at her home school, she would be isolated by herself for a substantial part of the school day. The case conference committee considered implementing the Student's IEP at her home school, but rejected the option as being harmful to the Student. The Student's teachers believe the proposed implementation of the Student's program at the junior high school appropriately addresses the Student's unique needs and would allow her to make educational progress. The Student's IEP could not be appropriately implemented in the "moderate" classroom at the home school because of the Student's extreme physical limitations. In addition, living skills and transition-to-work skills are emphasized in the program, and food preparation is an essential aspect of the class.

### ***The IHO's Conclusions of Law***

Based on the foregoing, the IHO concluded the School has not violated 511 IAC 7-27-9(3), which requires that, unless the IEP requires some other arrangement, a student with disabilities is educated in the school the student would attend if not disabled. The parties agree the Student's IEP is appropriate. The junior high school is the closest school that can adequately care for the Student and appropriately meet her needs. The Student's IEP cannot be appropriately implemented in her home school. The home school could not duplicate the quality of the existing MH program, and its availability of staff for related services and its resources. Moreover, the Student would be the only student in a MH program

conducted at the home school, whereas she would be one of seven students at the junior high school. Finally, the proposed MH classroom is the closest existing program available to the Student and is located between 37 and 45 minutes away from her residence (compared to 25-30 minutes to the home school). Bus personnel and teachers have been trained to meet the medical needs of the Student. Given these considerations, implementing the Student's special education program at the junior high school is an appropriate placement and location under Article 7.

### ***The IHO's Order***

The IHO ordered the School to continue to offer the special education programming called for in the November 7, 2000, IEP. The School was also ordered to provide direct transportation to the Student from her residence to the junior high school.

### ***Procedural History of the Appeal***

On January 10, 2001, the parent, by counsel, filed a notice of intention to file appeal and requested an extension of time in which to file the petition for review. The Board of Special Education Appeals (BSEA) granted the parent's request and on January 11, 2001, issued an order notifying the parties that the parent was granted an extension until January 22, 2001, in which to file her petition for review. The parent, by counsel, timely filed her Petition for Review. On January 29, 2001, the School, by counsel, requested an extension of time in which to file its reply. The Board of Special Education Appeals (BSEA) granted this request on January 30, 2001, such that the School's reply was due to be filed on or before February 22, 2001, and the BSEA's decision was thereby due to be rendered by March 14, 2001. The School's Reply was timely filed.

### ***Parent's Petition for Review***

The Parents, in their Petition for Review, take exception to findings of fact numbers 38, 41, 42, 43 and 45, and the conclusions of law,<sup>1</sup> as being unsupported by the evidence and testimony, misstating the testimony, or failing to adequately consider the procedural requirements of Article 7. The Parents argue the federal regulations create a presumption in favor of placing a child in the neighborhood school unless the child's IEP requires some other arrangement. In this case, the School's cooperative serves a four-county area, and has only two classrooms which are labeled MH. The Parents maintain that no other placement option was considered, or offered. The School made no consideration of modifications which could be made to the moderate program at the home school to meet the Student's needs.

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<sup>1</sup>The Parents note in their petition for review that the IHO failed to enumerate the conclusions of law. The Parents' objection appears to be a general objection to the conclusions as being unsupported by the evidence and testimony, a misstatement of the testimony, or contrary to law.

### *School's Reply to Petition for Review*

In its Reply, the School maintains the IHO's decision is supported by substantial evidence and should be upheld. The School notes that the first consideration is always the needs of the child. Placement at the Student's home school would not be appropriate to meet her needs. The moderate program which exists at the home school is not appropriate to meet the Student's needs, and creating a MH program for the Student would mean she would be the only student in the class.

#### REVIEW BY THE BOARD OF SPECIAL EDUCATION APPEALS

The Indiana Board of Special Education Appeals met on March 5, 2001, to conduct its review of the above-referenced matter without oral argument. All three members were present and had reviewed the record, the petition for review, and reply. The Indiana Board of Special Education Appeals now finds as follows:

#### *Combined Findings of Fact and Conclusions of Law*

1. The Indiana Board of Special Education Appeals is the entity of the State authorized to review the decisions of Independent Hearing Officers appointed pursuant to 511 IAC 7-30-3. The Indiana Board of Special Education Appeals (BSEA) has jurisdiction in the matter pursuant to 511 IAC 7-30-4.
2. The Parents take exception to findings of fact numbers 38, 41, 42, 43 and 45, and the conclusions of law, as being unsupported by the evidence and testimony, misstating the testimony, or failing to adequately consider the procedural requirements of Article 7.
3. The BSEA is charged with reviewing the entire record of the due process hearing to ensure the procedures of the hearing were consistent with 511 IAC 7-30-3.
4. The BSEA shall not disturb the findings of fact, conclusions of law, or orders of the IHO unless the BSEA finds the IHO's decision to be:
  - a. arbitrary or capricious.
  - b. an abuse of discretion.
  - c. contrary to law, contrary to a constitutional right, power, privilege, or immunity.
  - d. in excess of the jurisdiction of the IHO.
  - e. reached in violation of an established procedure.
  - f. unsupported by substantial evidence.511 IAC 7-30-4(j).
5. The Student is thirteen years (13) old and eligible for special education and related services as a student with multiple handicaps.
6. The Student's parents and the School are in agreement as to the Student's IEP.

7. The IHO's findings of fact numbers 38, 41, 42, 43 and 45 are supported by substantial evidence and testimony, do not misstate the testimony, and are in compliance with the requirements of Article 7.
8. The IHO's conclusions of law are supported by substantial evidence and testimony, do not misstate the testimony, and are in compliance with the requirements of Article 7.
9. Unless the IEP requires some other arrangement, a student with disabilities is to be educated in the school the student would attend if not disabled. 511 IAC 7-27-9(3).
10. The Student's IEP cannot be appropriately implemented in her home school.
11. The program at the junior high school is the closest program that can appropriately meet the Student's needs.

### **ORDERS**

1. The IHO's decision is affirmed.

All other Motions not specifically addressed herein are hereby deemed denied.

Date: March 5, 2001

/s/ Cynthia Dewes  
Cynthia Dewes, Chair  
Board of Special Education Appeals

### **Appeal Right**

Any party aggrieved by the written decision of the Indiana Board of Special Education Appeals has thirty (30) calendar days from receipt of this decision to request judicial appeal from a civil court with jurisdiction, as provided by I.C. 4-21.5-5-5 and 511 IAC 7-15-6(p).